STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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In re:	)	**1998 OAL DETERMINATION No. 1**
Request for Regulatory Determination filed by the SOUTHERN CALIFORNIA WOMEN'S LAW CENTER concerning section 200 of the CALIFORNIA INTERSCHOLASTIC FEDERATION Bylaws which concerns participation of girls in high school interscholastic sports teams	)	**[Docket No. 90-045]**
	)	**April 3, 1998**
	)	**Determination Pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3**

Determination by: CHARLENE MATHIAS, Assistant Chief Counsel

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SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not a rule issued by the California Interscholastic Federation concerning the participation of girls in high school interscholastic sports teams is a "regulation" and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the California Interscholastic Federation ("CIF") is *not* subject to statutory rulemaking requirements because it is *not* a "state agency" for the purposes of the Administrative Procedure Act.

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THE ISSUE PRESENTED [1]

The Office of Administrative Law ("OAL") has been requested[2] to determine[3] whether or not Section 200 of the By-Laws ("Rule") adopted by CIF is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").[4,5]

THE DECISION [6,7,8]

OAL finds that CIF is not a "state agency" for purposes of the APA. Therefore, CIF's rules, including Rule 200, are not subject to the provisions of the APA.

ANALYSIS

IS THE APA GENERALLY APPLICABLE TO THE CALIFORNIA INTERSCHOLASTIC FEDERATION?

I. BACKGROUND

A. The Agencies

The challenged rule relates to interscholastic athletics. Three entities have responsibilities regarding interscholastic athletics. The different responsibilities of all three entities are briefly described below, although only two were challenged by the Law Center as using the rule.

Local school districts are responsible for interscholastic athletics, not the Department of Education or other state departments. This is the result of deliberate public policy decisions made by the Legislature over a period of years clearly establishing that the power over matters involving interscholastic athletics resides in the governing boards of the individual school districts. We quote from *California Teachers Association, et al., v. Governing Board Of Rialto Unified*

School District, et al. (1997):

"Some history helps explain the Legislature's policy decision in this regard. . . . [U]ntil 1981, the Legislature placed primary control over athletic activities in public schools in the State Department of Education. Section 33352, as it read before 1981, stated: 'The Department of Education shall exercise general supervision over the courses of physical education in elementary and secondary schools of the state; *exercise general control over all athletic activities of the public schools;* advise school officials, school boards, and teachers in matters of physical education; and investigate the work in physical education in the public schools.' (Stats. 1976, ch. 1010, § 2, p. 3043, operative Apr. 30, 1977, italics added.)"

"Beginning in 1981, the Legislature began transferring general supervisory power over public school athletic activities from the Department of Education to the individual school districts. First, section 33352 was amended to delete the phrase directing the department to 'exercise general control over all athletic activities of the public schools.' (Stats. 1981, ch. 1001, § 1, p. 3866.) More importantly, the same legislation added section 35179, which provided: '(a) Each school district governing board shall have general control of, and be responsible for, all aspects of the interscholastic athletic policies, programs, and activities in its district, including, but not limited to, eligibility, season of sport, number of sports, *personnel*, and sports facilities.' (Stats. 1981, ch. 1001, § 5, p. 3868, italics added.) *As is clear, these 1981 enactments 'retained the education department's power of general supervision over physical education courses, . . . [but] divested the department of control over interscholastic athletics, vesting that control instead in the governing boards of school districts.' (San Jose Teachers Assn. v. Barozzi, . . .* 230 Cal. App. 3d at p. 1381; see also *Steffes v. California Interscholastic Federation* (1986) 176 Cal. App. 3d 739, 750, 222 Cal. Rptr. 355.)" [Emphasis in preceding sentence added by OAL.]

1. The California Interscholastic Federation

The California Interscholastic Federation ("CIF") came into being in 1914 as a voluntary organization. Its purpose was to provide rules for participating schools

for student participation in interscholastic athletics. The organization grew, and in 1981, Section 33353 was added to the California Education Code.[10] The section provided:

> "The California Interscholastic Federation *is a voluntary organization* consisting of school and school related personnel with responsibility, generally, for administering interscholastic activities in secondary schools. It is the intent of the Legislature that the California Interscholastic Federation, *in consultation with the State Department of Education*, implement the following policies:
>
> (a) Give local school boards specific authority to select their athletic league representatives.
>
> (b) Require that all league, section, and *state meetings* affiliated with the California Interscholastic Federation be subject to the notice and hearing requirements of the *Brown Act* (Chapter 9 (commencing with Section 54950) of Division 2 of Title 5 of the Government Code).
>
> (c) Establish a neutral final appeals body to hear complaints related to interscholastic athletic policies.
>
> This section shall remain in effect only until June 30, 1987, and as of such date is repealed, unless a later enacted statute, which is chaptered before June 30, 1987, deletes or extends such date." [Emphasis added.]

Subsequently, the law has been extended several times.[11] Any changes since then have no impact on the issues we consider. At the time the determination request was filed, the relevant law was identical to the statute as first enacted in 1981.

In 1996, the Legislature also addressed the nature of CIF in uncodified language stating:[12]

> "(a) The Legislature finds and declares all of the following:
>
> (1) The California Interscholastic Federation (CIF) is a voluntary

organization that was first organized in 1914. It consists of school personnel that has had general responsibility for administering interscholastic athletic activities in high school sports and is accountable to governing boards of school districts and other local agencies.

(2) The CIF is associated with over 1,200 member schools and over 400,000 girls and boys. Through participation in athletic-centered interscholastic activities, high school pupils in California develop values, attitudes, and skills for personal growth.

. . .

(4) The CIF is governed by state and federal statutes regarding athletics and complies with State Board of Education guidelines regarding discrimination and gender equity. In addition, the CIF is governed by its own constitution and corresponding By-Laws that are developed and approved by a 30-member federated council representing all facets of the education community."

Finally, the CIF Constitution is evidence of what type of organization CIF believes itself to be. Paragraph 11 of the Constitution lists the purposes of the organization. The first purpose is:

"(a) To serve as an organization through which member high schools may mutually adopt rules and regulations relating to interscholastic athletics, (grades 9 through 12) and establish agreed upon minimum standards for certain aspects of the interscholastic athletic program; to guide schools and school districts in the discharge of their responsibilities for, among other consideration, the health, safety, general welfare and educational opportunities of the students taking part in interscholastic athletics."

2. School District Governing Boards

Education Code section 35179 states:

"(a) *Each school district governing board shall have general control of, and be responsible for, all aspects of interscholastic athletic policies, programs, and activities in its district*, including but not limited to, eligibility, season of sport, number of sports, personnel, and sports facilities. In addition, the board shall assure that all interscholastic policies, programs, and activities in its district are in compliance with state and federal law.

"(b) Governing boards may enter into associations or consortia with other boards for the purpose of governing regional or statewide interscholastic athletic programs by permitting the public schools under their jurisdictions to enter into a *voluntary association with other schools for the purpose of enacting and enforcing rules relating to eligibility for, and participation in, interscholastic athletic programs among and between schools*.

. . .

"(d) No voluntary interscholastic athletic association, of which any public school is a member, shall discriminate against, or deny the benefits of any program to, any person on the basis of race, sex, or ethnic origin." [Emphasis added.]

3. The Department of Education

There is no dispute that the Department is a state agency for purposes of the APA. Education Code Section 33300 creates the State Department of Education "*in the state government.*"

In addition to the role set out in 33353 to act as consultant to the CIF, the Department of Education's role with respect to interscholastic athletics was set out in the same statute that first mentioned the CIF in the California Codes. Education Code Section 33354[13] provided that:

"(a) The State Department of Education shall have the following authority over interscholastic athletics:

(1) The State Department of Education may state that the policies of school districts, of associations or consortia of school districts, and of

the California Interscholastic Federation, concerning interscholastic athletics, are in compliance with both state and federal law."

The section went on to provide that if the State Department of Education finds the CIF is not in compliance with the law, it may require the association to adjust the policy and sue the association if necessary. However, the State Department of Education shall not have authority to determine the specific policy which the association must adopt. This part of the statute was also made effective until June 30, 1987 unless a new statute extended the date.

Subsequently, the law was extended[14]. The only major addition to the law since 1981 occurred in 1991 when a new paragraph (c) was added to provide:

> "The state law with which the policies of school districts, of associations, or consortia of school districts, and of the California Interscholastic Federation, concerning interscholastic athletics, are required to comply, in accordance with this section, includes, but is not limited to, any regulations issued by the State Board of Education pursuant to Section 232 with regard to sex discrimination in interscholastic athletics."

Any changes since then have had no impact on the issues we consider. At the time of the determination request, the relevant law was identical to the statute as first enacted in 1981.

Although there may have been a mixed history as to what role is played by different entities in interscholastic athletic programs, the above statutes clearly indicate that the local school districts, rather than the state, have responsibility for interscholastic athletics and the school boards may use voluntary associations to enforce policies related to the athletic programs.

B. This Request for Determination

This request for determination was brought by the Southern California Women's Law Center ("Requester"). The Requester asks for a determination concerning Rule 200 adopted by CIF.[15] Rule 200 of the CIF rules concerns who may be a member of sports teams designated "student team," "boys' team," "girls' team,"

and "mixed team." The Requester queries whether the CIF is a "state agency" and as such must adopt this rule pursuant to the provisions of the APA.[16] The rule states:

> "Only students regularly enrolled in public and private CIF member schools, grades 9-12, shall be permitted to participate in the California Interscholastic Federation and shall represent only that school of enrollment except as provided in By-Law 303. Interscholastic sports teams composed of boys and/or boys and girls shall be conducted in accordance with these By-Laws. Girls Interscholastic sport teams shall be conducted according to these By-Laws, including certain additional rules and modifications pertaining to girls' sports teams and mixed sports teams. Schools shall designate the type of team for each sport according to the following:
>
> (a) *Student team:* Whenever the school provides only a team or teams for boys in a particular sport, girls are permitted to qualify for the student team(s).
>
> (b) *Boys' team:* Whenever the school provides a team or teams for boys and team or teams for girls in the same sport, *girls shall not be permitted to qualify for the boys' team(s) in that sport, nor shall boys be permitted to qualify for the girls' team(s) in that sport.*
>
> (c) *Girls' team:* Whenever the school provides only a team or teams for girls in a particular sport, boys shall not be permitted to qualify for the girls' team in that sport unless opportunities in the total sports program for boys in the school has been limited in comparison to the total sports program for the girls in that school. Permission for boys to qualify for a girls' team must be secured through petition by the school principal to the State CIF Federated Council.
>
> (d) *Mixed team:* (Coed.) Whenever the school provides a mixed or coed team in a sport in which the game rules designate either a certain number of team participants from each sex or contains an event that designates a certain number of participants from each sex, boys shall not be permitted to qualify for the girls' positions on the mixed team nor shall girls be permitted to qualify for the boys' positions on the mixed team.
>
> (e) These limitations are binding upon all CIF sections, although not

intended to prohibit any student from qualifying for a high-school team on which he or she has previously competed.

A student who participates in an interscholastic athletic content or participates in at least one class at the school shall be considered to be 'enrolled' in that school in accordance with Rule 200 and shall be classified as a transfer student if the student subsequently enrolls at another school. (A scrimmage is not a contest.) See Rule 1200 for approved sports." [Emphasis added.]

On January 31, 1997, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,[17] along with a notice inviting public comment.[18] No public comments were received. The CIF filed a response; however, the Department of Education did not respond to the Request for Determination.

II. DISCUSSION

The term "regulation" is defined by Government Code section 11342, subdivision (g), as follows:

> "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any rule, regulation, order or standard *adopted by any state agency* to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . ." [Emphasis added.]

Government Code Section 11340.5, subdivision (a), provides as follows:

> "*No state agency* shall issue, utilize, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (g) of Section 11342 unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." [Emphasis added.]

Whether the CIF is a "state agency" or not is critical to the determination as to whether the APA applies to its rulemaking. These two code sections are very specific: a rule by definition is a "regulation" under the APA *only if* adopted by a "*state* agency" and "*state* agencies" are prohibited from issuing "underground regulations." If CIF is not a "state agency," then the APA does not apply to it, and the CIF need not follow the APA's rulemaking process.

What is a "state agency"? Government Code section 11000 defines the term "state agency" as follows:

> "As used in this title [Title 2. Government of the State of California (which title encompasses the APA)], 'state agency' includes every *state* office, officer, department, division, bureau, board, and commission." [Emphasis added.]

The APA further clarifies or narrows the definition of "state agency" from that in Section 11000 by specifically excluding "an agency in the judicial or legislative departments of the state government." Government Code 11342, subdivision (a).

Although there are no cases specifically addressing the issue of whether CIF is a state agency, there are cases cited by the Law Center which hold that the activity of the CIF is "state action" for purposes of constitutional analysis. In *Steffes v. California Interscholastic Federation* (1986),[19] the court held, without further elaboration:

> "We note initially that, inasmuch as CIF is an organization with responsibility for administering interscholastic athletics in all California secondary schools (see Education Code section 33353), the enforcement of its rules constitutes 'state action' for purposes of constitutional analysis."

California Interscholastic Federation v. Jones (1988),[20] also stated:

> "The CIF was legislatively recognized in 1981 as a voluntary organization with responsibility for administering interscholastic athletics in California secondary schools. (Ed. Code, § 33353.)

[footnote omitted] Enforcement of its rules constitutes 'state action' for purposes of constitutional analysis. (*Steffes v. California Interscholastic Federation*, . . . 176 Cal.App.3d at p. 746, . . .)"

We note that the actions taken by CIF have been held to be "state action" for the purpose of constitutional analysis. However, the question before the OAL is not whether issuing, using and enforcing a rule is "state action" for purposes of constitutional analysis, but whether the CIF is a "state agency" under the APA. In other words, if CIF is not a "state agency" under California statutes, its rules may be challenged on several bases, but not on the basis that they are invalid because they were not adopted according to required state rulemaking procedures. We find that CIF *is not* a "state agency" based on the plain meaning of the language of the statutes (Government Code Sections 11000 and 11340.5 and Education Code Section 33353) and the line of cases clarifying that an entity can be considered a state agency by the courts for one purpose but not another.

A. IS THERE ANY LANGUAGE IN THE STATUTES WHICH CAN BE CONSTRUED TO MAKE CIF A STATE AGENCY FOR PURPOSES OF THE APA?

In order to determine whether CIF was intended to be treated as a state agency for purposes of the APA, OAL looks to the plain language in the APA defining "state agency" and to the CIF statute. Certain rules of statutory construction guide a court's consideration of a statute. A general rule of statutory construction is that, "[i]f the language is clear, there can be no room for interpretation; effect must be given to the plain meaning of the words."[21] The California Court of Appeal in *Johnston v. Department of Personnel Administration* (1987)[22] summarized its responsibilities related to statutory construction as follows:

"Certain rules of statutory construction guide our consideration. In *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 110 Cal.Rptr. 144, 514 P.2d 1224 the court stated: 'We begin with the fundamental rule that a court "should ascertain the intent of the Legislature so as to effectuate the purpose of the law." . . . We are required to give effect to statutes "according to the usual, ordinary import of the language employed in framing them." [Citations.]'"

"As a general rule of statutory construction, if a statute announces a general rule and makes no exception thereto, the courts can make none. (*Stockton Theatres, Inc. v. Palermo* (1956) 47 Cal.2d 469, 476, 304 P.2d 7). A court may not insert into a statute qualifying provisions not included or rewrite a statute to conform to an inferred intention that does not appear from its language. (*Mills v. Superior Court* (1986) 42 Cal.3d 951, 957, 232 Cal.Rptr. 141, 728 P.2d 211.)"

In *People v. A-1 Roofing Service, Inc.* (1978),[23] the reviewing court addressed the issue of whether certain rules and regulations issued by the South Coast Air Quality Management District ("SCAQMD"), an air pollution district, were properly adopted. The defendant therein argued that the SCAQMD is a state agency and is therefore required to file its rules and regulations with the Secretary of State and have them published in the official code in order to make them valid. The court's response to that contention was:

"While regulations of *state* agencies must follow this procedural route, the short answer to defendant's contention that the wrong statutory procedure was followed is that, as noted above, the SCAQMD is expressly provided to be a *local* agency [not a "state agency"]. (§ 40412.) That section expressly refers to the SCAQMD as 'the sole and exclusive local agency within the South Coast Air Basin with the responsibility for comprehensive air pollution control. . .'"

. . .

"Defendant refers to [Health and Safety Code] section 40700, which states that 'A district is a body corporate and politic and a public agency of the state.' In our view that section only states the obvious; the SCAQMD and other such districts are not *private* agencies. The section does not declare that the district is a 'state agency.'"[24] [Emphasis added.]

This case finds that even a district which is a "public agency" of the state, is still not a "state agency" for purposes of the APA. The case reflects an understandable reluctance to judicially expand upon or to creatively interpret the unambiguous statutory definition of a "state agency."

The plain meaning of the words "state agency" in Government Code sections 11000, 11342 and 11340.5 includes agencies in state government. Government Code section 11000 contains no language which can be interpreted to specifically include voluntary organizations or any other type of agency. The only descriptive words in that statute narrow or clarify what in state government is an agency (e.g. "office", "bureau" etc.). OAL has been unable to locate any authority in legislative history, cases or attorney general opinions that the meaning of "state agency" has been expanded to include local agencies or private voluntary agencies. The APA sections cited above, 11340.5 and 11342, clearly state that the regulatory process applies only to "state" agencies.

In plain language in Education Code Section 33353, the Legislature states that CIF is a "voluntary organization" consisting of local school district personnel. Giving meaning to the terms the Legislature chose in 1981 to describe CIF ("voluntary organization"), particularly in context with the facts at that time (it was and always had been a private entity) means CIF was in 1981 a private entity, which had been in existence for years without being created by the state. The Legislature used no language to indicate that it intended to transform that entity into a public one, or to a state agency. If anything, the Legislature seemed intent as time went by to decrease the involvement of the *State* Department of Education in interscholastic athletic activities.

The words "voluntary organization" are inconsistent with a finding that CIF is a state entity. Had the Legislature chosen to take a private organization and make it a state agency, it could have used appropriate language. There are many examples of the Legislature creating state agencies, including the example of the Department of Education (see Education Code section 33354, cited above). The Legislature will specifically say that the entity is in state government.

In *Tidewater Marine Western, Inc v. Bradshaw* (1996)[25] the court was unwilling to add language to a state agency's statute in the "absence of textual support or some other persuasive indication of legislative intent." The court went on to state that it would not "assume the Legislature intended the [Division of Labor Standards Enforcement] to adopt regulations without any public participation or procedural safeguards." Just as the court would not read an exemption into the statutes, neither can we read inclusion when it simply is not there.

None of the statutes specifically or obliquely refer to CIF as a state agency. It is difficult to see how a voluntary organization comprised of local entities' personnel could be a "state agency" for the purpose of the APA, without inserting qualifying provisions into or rewriting these statutes -- contrary to the rule of statutory construction enunciated by the *Mills* court cited in *Johnston v. DPA*.[26]

B. DOES AN AGENCY, WHICH IS NOT A STATE AGENCY, BECOME ONE FOR PURPOSES OF THE APA BY CONDUCTING THE STATE'S BUSINESS?

1. Instrumentality of State Agency

There is no authority for the proposition that the Legislature intended in general that private entities, whatever their relationship with state agencies, are subject to the APA. Whether an otherwise private organization may become a "state agency" because of its powers or relationship with a bona fide state agency was directly addressed in 1991 OAL Determination No. 6.[27] OAL found that even though regional centers have a very close tie to the Department of Developmental Services ("DDS"), specifically "regional centers, operated by private nonprofit community agencies under contract with DDS" (Welfare and Institutions Code Section 4620), the centers were nonetheless not subject to the APA. There simply was no ambiguity in the APA to read in the words "agent" or "instrumentalities" of the state.

> "The law appears unambiguous. Government Code section 11342, subdivision (b), and 11347.5 [now 11340.5], subdivision (a), both use the term 'state agency' *without elaboration*. Government Code section 11000, which provides the meaning of a "state agency' as used in sections 11342 and 11347.5 [11340.5] does not include an 'agent' or 'instrumentality' of the state. Reading those statutes together, it must be concluded that *in determining the applicability of the APA*, the definition of 'state agency' does not include private entities, even if they are 'agents' or 'instrumentalities' of the state."[28] [Emphasis added.]

OAL went on to point out that:

"In the matter at hand, regional centers are certainly subject to applicable statutes, regulations, and valid contractual provisions. Additionally, it might be that under the governing statute, the only rules that regional centers might legally utilize on certain topics would be rules duly adopted by DDS. Similarly, regional center actions would appear to be subject to judicial review. However, we are not aware of any authority to support the proposition that in enacting the APA, the Legislature intended in general that *private* entities, whatever their relationship with state agencies, would *themselves* be subject to APA rulemaking requirements. As discussed, case law favors the opposite view."[29]

There have been no intervening laws which would indicate that this interpretation of the APA definition of "state agency" should be changed. Although CIF is certainly subject to applicable state and Federal statutes, regulations, and constitutional provisions, and CIF's actions would appear to be subject to judicial review, we are not aware of any authority to support the proposition that in enacting the APA, the Legislature intended that private entities, such as CIF, whatever their relationship with state agencies, would themselves be subject to APA rulemaking requirements. As discussed, case law continues to favor the opposite view.

2. Conducting the State's Business

Neither will OAL read into the APA that "state agency" as defined Government Code section 11000 be more expansive to include a "voluntary organization," which, although not an "agent" or "instrumentality" of the state, conducts some business under a statute of the State of California. In some statutes the Legislature has broadened the meaning of "state agency" for purposes of the application of a specific statutory scheme. As noted in 1991 OAL Determination No. 6.:

"[Government Code] Sections 11121.2, 11121.7 and 11121.8 expand the definition of a 'state body' (as originally set forth in section 11121) and broaden the applicability of the Open Meeting Act. [However,] [n]o such statutory expansion of the definition of 'state agency' broadening APA applicability exists."[30]

If the Legislature chooses to make an entity, which is doing some business for the state, follow state procedures that it otherwise would not have to follow, the Legislature may so indicate in the enabling statute. In fact, in this statute,[31] describing CIF's duties, the Legislature did choose to mandate that the CIF, otherwise not subject to state or local open meeting statutes, conduct its business following the *local* open meeting statute. The Legislature, had it so chosen, also could have required that CIF's rulemaking be subject to the APA. The Legislature did not include that language in the statute and, therefore, without any further evidence of intent, OAL will not insert it into the Education Code.

C. IF AN ENTITY HAS BEEN TREATED BY THE COURTS AS A STATE AGENCY FOR ONE PURPOSE, MUST IT BE FOR ALL PURPOSES?

The case of *Torres v. Bd. of Commissioners of the Housing Authority of Tulare Co.* (1979)[32] dealt directly with the issue of whether a local agency, treated as a state agency for one purpose, is a state agency for all purposes. The issue in that case was whether the Bagley-Keene Open Meeting Act ("Bagley-Keene"),[33] which applies to all state agencies, applies to a *local* housing authority. In ruling that the State Act did not apply to the housing authority, the California Court of Appeal stated:

> ". . .the placement of Government Code section 11120 and its history is some persuasive indication that the State Act was meant to cover executive departments of the *state* government and was not meant to cover *local* agencies merely because they were created by state law. A housing authority is no more a *state* agency under these acts than is a city or a county. The fact that such entitles [sic] from time to time administer matters of state concern may make them state agents for such purposes but not state agencies under the Open Meeting Acts."[34]
>
> . . .
>
> "While a housing authority may be a state agency for some purposes (see, e.g., *Housing Authority v. City of L.A.* (1952) 38 Cal.2d 853, 243 P.2d 515; 21 Ops.Cal.Atty.Gen 40, 42 (1953) if it is within the Brown Act's definition of a local agency, it is simply not included within the State Act." [Emphasis

added.][35]

While the *Torres* case did not specifically address the scope of the term "state agency" as that term is defined in Government Code section 11000 for purposes of APA review, the analogy logically follows -- i.e., the fact that an entity may be an "agent" of the state for some purpose does not *ipso facto* transform that entity into a "state agency" for APA rulemaking purposes.[36]

Recently, the California Court of Appeal has reiterated the point that labeling a governmental entity as a state agency in one context does not compel treatment of that entity as a state agency in all contexts, and is not synonymous with identifying that entity as an arm of the state for purposes of the Eleventh Amendment immunity. *Lynch v. San Francisco Housing Authority* (1997).[37]

We find nothing in relevant state statutes --Government Code sections 11000, 11342 and 11340.5 -- or case law that would lead to a conclusion that CIF should be treated as a "state agency" for the purposes of the APA.

Similar conclusions that private entities are not subject to the APA have been arrived at elsewhere. In *B. C. v. Board of Education, Cumberland Regional School District, et al.* (1987),[38] an organization very similar to the CIF was found by the Superior Court of New Jersey, Appellate Division, *not to be a state agency* for purposes of New Jersey's Administrative Procedure Act. In that case, the New Jersey Office of Equal Educational Opportunity ("OEEO") collaborated with other agencies and the New Jersey State Interscholastic Athletic Association ("Athletic Association") to develop "athletic guidelines." The Athletic Association is a voluntary association of public and non-public schools formed for the purposes of promoting and regulating interscholastic sports activities. The Athletic Association adopted a resolution relating to participation of boys in girls' sports. The court held:[39]

> "The activities of the Athletic Association in sponsoring, administering, regulating and supervising interscholastic athletics constitute state action. *Christian Bros. Inst. v. N.J. Interschol. League*, 86 N.J. 409, 416-17, 432 *A.*2d 26 (1981); *Clark v. Arizona Interschool. Ass'n*, 695 *F.*2d at 1128. Nevertheless, the fact that the

activities of the Athletic Association constitute state action does not itself classify an organization or association as a state agency.

. . . The Athletic Association is an independent voluntary association of the boards of education of local school districts as well and private schools who have elected to join the association for the coordination and regulation of athletic programs conjunction with other school districts. The rules and regulations are promulgated by the Athletic Association and the school district. The local school district becomes subject to its constitution, bylaws, rules and regulations by joining a voluntary association. It is a confederation by which local school boards agree to become bound by the rules and regulations of the voluntary association for the orderly regulation of their athletic programs. Since the Athletic Association is a private organization, its rules and regulations *are not* the *[sic]* subject to the Administrative Procedure Act concerning rulemaking." [Emphasis added.]

A similar conclusion is reached by Professor Bonfield in *State Administrative Rulemaking.*[40] Professor Bonfield discusses the Model State Administrative Procedure Act of 1981 ("Model Act"), which defines an "agency" subject to the provisions of the Model Act as "a board, commission, department, officer, or other administrative unit of this state. . . ." Professor Bonfield argues that

". . . the problems of dealing with both state and local agencies in one statutory scheme are insurmountable. After all, the size, financing, number, and territorial jurisdiction of local agencies are substantially different from those characteristics of state agencies.

. . . the mere fact that a local governmental unit receives state funds, administers state law, or is authorized by a state statute to be created or appointed by a political subdivision does not place it within the [Model Act's] definition of an agency. . .".

D. CONCLUSION

CIF is a voluntary organization of personnel from local school districts whose function is to adopt rules for interscholastic athletics for its member districts. This fact, along with the plain meaning of the applicable statutes, read in conjunction with the court's reluctance to expand on the definition of "state agency," indicate at most an intent to treat CIF as a local entity for purposes of its operating procedures.[41] Merely because CIF's members comprise school districts from around the state, and its rules are implemented on a statewide basis, the CIF is not magically transformed from a private entity into a "state agency" for purposes of the APA. The CIF is not a "state agency" within the meaning of Government Code section 11000, and therefore is not subject to the provisions of the APA.

III. CONCLUSION

The Office of Administrative Law has concluded that the California Interscholastic Federation ("CIF") is *not* subject to statutory rulemaking requirements because it is *not* a "state agency" for the purposes of the Administrative Procedure Act.

DATE: April 3, 1998

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ENDNOTES

1. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to **1986 OAL Determination No. 1** (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, review denied (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a second survey of governing case law was published in **1989 OAL Determination No. 13** (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a third survey of governing case law was published in **1990 OAL Determination No. 12** (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11340.5, and the other opinion issued thereafter.

In January 1992, a *fourth* survey of governing case law was published in **1992 OAL Determination No. 1** (Department of Corrections, January 13, 1992, Docket No. 90-010), California Regulatory Notice Register 92, No. 4-Z, page 83, note 2. This fourth survey included two cases holding that government personnel rules could not be enforced unless duly adopted.

In December 1993, a *fifth* survey of governing law was published in **1993 OAL Determination No. 4** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register 94, No. 2-Z, page 61, note 3.

In December 1994, a *sixth* survey of governing law was published in **1994 OAL Determination No. 1** (Department of Education, December 22, 1994, Docket No. 90-021), California Regulatory Notice Register 95, No. 3-Z, page 94, note 3.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

2. This Request for Determination was filed on October 17, 1990 by Abby Leibman, Esq., Managing Director, Southern California Women's Law Center, 3460 Wilshire Blvd., Ste. 1102, Los Angeles, CA 90010, (213) 637-9900. On March 17, 1997 another letter from Abby Leibman on behalf of the Southern California Women's Law Center was sent in support of and to supplement the original determination request.

The California Interscholastic Federation, 664 Las Gallinas Ave., San Rafael, CA 94903, (415) 492-5911, responded to the request on March 20, 1997 by letter signed by Andrew Patterson, General Counsel to the CIF. The Department of Education has not responded to this Request for Determination.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

> "'*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is ***invalid and unenforceable*** unless
>
> > (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,
> >
> > (2) it has been exempted by statute from the requirements of the APA." [Emphasis added.]

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid and unenforceable* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that an uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*").

4. To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State

and as distributed in typewritten format by OAL is "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

This determination may be cited as "1998 OAL Determination No. 1."

5. According to Government Code section 11370:

> "*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370) *and Chapter 5* (commencing with Section 11500) *constitute* and may be cited as, *the Administrative Procedure Act.*" [Emphasis added.]

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359. Chapters 4 and 5, also part of the APA, concern the Office of Administrative Hearings and Administrative Adjudication, respectively.

The rulemaking portion of the APA and all OAL regulations are both reprinted and indexed in the annual APA/OAL regulations booklet "**California Rulemaking Law,**" which is available from OAL (916-323-6225). The Feb. 1997 revision is $3.50 ($6.40 if sent U.S. Mail).

6. *OAL Determinations Entitled to Great Weight In Court.*

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule met the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10** (Department of Health Services, Docket No. 86-016, August 6, 1987), CRNR 96, No. 8-Z, February 23, 1996, p. 293. The *Grier* court concurred with OAL's conclusion, stating that the

> "Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) [now subd. (g)]. [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted to the court for consideration in the case, the court further found:

> "While the issue ultimately is one of law for this court, the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, [now 11340.5] subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) [now subd. (g)], *we accord its determination due consideration.*" [Id.; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground, regulation," was "*entitled to due deference.*" [Emphasis added.]

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of **1990 OAL Determination No. 4** (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

7. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) Of course, an agency rule found to violate the APA could also simply be rescinded.

8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of his Determination.

9. 14 Cal.4th 627; 59 Cal.Rptr. 671. Briefly, this case dealt with whether the authority for establishing the qualifications of and hiring procedures for athletic coaches for interscholastic athletics rests with the State Department of Education or the local governing boards of school districts.

10. Statutes of 1981, Chapter 1001.

11. Statutes of 1986, Chapter 646; Statutes of 1991, Chapter 617; Statutes of 1993, Chapter 487; and Statutes of 1996, Chapter 151.

12. Section 1 of Statutes of 1996, Chapter 151 (SB 237).

13. Statutes of 1981, Chapter 1001.

14. Statutes of 1986, Chapter 646; Statutes of 1991, Chapter 617; Statutes of 1993, Chapter 487; and Statutes of 1996, Chapter 151.

15. The Southern California Women's Law Center (Requester) letter of October 17, 1990 states that "There are two state agencies which have issued, utilized, enforced or attempted to enforce this rule, and both are the subject of this Request for Determination. They are: [CIF] and the Department of Education (Department)". Although the request refers to the Department, OAL has determined that it is unnecessary to analyze whether the Department has adopted a regulation not in compliance with the APA for the following reasons. Although the Department is created in the state government by Education Code section 33300 and as a state entity *is* subject to the APA, no showing has been made to OAL that the Department has in fact "issued, utilized, enforced or attempted to enforce" CIF's rule. The Department's role in interscholastic athletics and its relation to CIF, as described in the text, is limited. The Department has no authority over the actions of CIF in its rulemaking. The Department is in a position to be consulted by CIF on the rules it proposes. [Education Code 33353, subdivision (a).] At most the Department can state that the policies of CIF are or are not in compliance with state or federal law and ultimately sue CIF for its failure to follow state or federal law. [Education Code 33354, subdivision (a)] However, it has no direct authority to enforce CIF's rules or to engage in rulemaking itself in the area of interscholastic athletics.

    The Requester also asks two other questions which OAL has no authority to analyze: (1) whether the CIF has any authority to issue, use or enforce rules or regulations in California if it is not a state agency; and (2) whether Department of Education ("Department") violated the law when it delegated authority to CIF to issue, use and enforce bylaw 200 without adopting it pursuant to the APA. OAL does not have the authority to determine whether the CIF pursuant to some other statute does or does not have the authority to issue rules if it is not a state agency, nor does OAL have authority to determine whether the Department has violated any law other than the APA.

16. Since this Request for Determination was submitted in 1990, Rule 200 has been modified; however, the modifications affect neither the language which concerns the Requester nor this analysis.

17. California Regulatory Notice Register 91, No. 2-Z, January 11, 1991, p. 69.

18. *Note Concerning Comments and Responses*

In order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

19. 176 Cal.App.3d 739, 746, 222 Cal. Rptr. 355, 359.

20. 197 Cal. App. 3d 751, 756; 243 Cal. Rptr. 271, 274.

21. *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 818, 226 Cal.Rptr. 81, 85. (questioned on other grounds, *Farnham v. Superior Court* (1987) 60 Cal.App.4th 69, 70 Cal.Rptr.2d 85.)

22. 191 Cal.App.3d 1218, 1223, 236 Cal.Rptr. 853, 856.

23. 87 Cal.App.3d Supp. 11, 12, 151 Cal.Rptr. 522, 528.

24. *Id.*, 87 Cal.App.3d Supp. at pp. 11-12, 151 Cal.Rptr. at p. 528.

25. 14 Cal.4th 557, 570, 59 Cal.Rptr.2d 186, 194.

26. *Mills v. Superior Court* (1986) 42 Cal.3d 951, 957, 232 Cal.Rptr. 141, 728 P.2d 211.

27. 1991 OAL Determination No. 6 (Department of Developmental Services, October 3, 1991, Docket No. 90-008), California Regulatory Notice Register (CRNR) 91, No. 43-Z, October 25, 1991, p. 1451.

28. Id., 91, No. 43-Z at p. 1456, typewritten version at p. 163.

29. Id., 91, No. 43-Z at p. 1457, typewritten version at p. 166.

30. Id., 91, No. 43-Z at p. 1457, typewritten version at p. 165.

31. Education Code 33353, subdivision (b).

32. 89 Cal.App.3d 545, 152 Cal.Rptr. 506.

33. Government Code sections 11120 - 11132.

34. 89 Cal.App.3d 545, 550, 152 Cal.Rptr. 506, 509.

35. *Id.*, 89 Cal.App. 3d at p. 549, 152 Cal.Rptr. at p. 509.

36. This does not mean that state agencies are free to avoid compliance with the APA by simply attributing the rule to a private entity. The basic question will always be whether or not the state agency issued, utilized, enforced, or attempted to enforce the uncodified rule. Government Code section 11340.5. For instance, **1987 OAL Determination No. 10** (Department of Health Services, Docket No. 86-016, August 6, 1987), CRNR 96, No. 8-Z, February 23, 1996, p. 293. A state agency argued that certain challenged rules did not violate the APA because they had been issued by a private entity. We rejected this claim, and concluded that the state agency had issued the rules. This conclusion was based on the following considerations: (1) one of the challenged rules (an administrative bulletin) stated that the private contractor was publishing it at the request of the state agency; (2) the cover letter for the manual which the bulletin updated was printed on the letterhead of the state agency and stated that the manual had been prepared by the contractor cooperation with the state agency; (3) introductory language in a challenged portion of the manual stated that the policy statements that followed were the responsibility of the state agency; and (4) the state agency itself twice mailed out copies of the rules in question in response to requests for copies of written guidelines applicable to the specific program. Thus, in this 1987 determination, we concluded that the state agency had issued and utilized the rules under review.

37. 55 Cal.App.4th 527, 65 Cal.Rptr.2d 620, 623.

38. 531 A.2d 1059.

39. 531 A.2d 1059, 1069-70.

40. (1986, 1993 Supplement), p. 49.

41. The Requester on page 3 of its March 17, 1997 letter argues that "It perverts logic, sound reasoning and Due Process to argue that an agency must allow public comment on its action, but not provide meaningful notice in order to obtain that comment." OAL may not pass judgment as to whether it is a good idea to subject the CIF to a notice and public input process for rulemaking. The Legislature made a choice to subject it to Brown Act requirements for the conduct of its meetings and can subject it to other local or state operating procedures if it so chooses.